Supreme Court, U.S.
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No. 96-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KEVIN P. McGEENEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE GOVERNMENT MET ITS HEAVY BURDEN UNDER *KASTIGAR V. UNITED STATES*, 406 U.S. 441 (1972), TO SHOW THAT IT MADE NO USE OF APPELLANT'S IMMUNIZED STATEMENTS.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

KEVIN P. McGEENEY,
CORPORAL,
UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Kevin P. McGeeney respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces (App., *infra*, 1a-15a) is reported at __ M.J. ___. The opinion of the Navy-Marine Corps Court of Criminal Appeals (App., *infra*, 16a-34a) is reported at 41 M.J. 544.

JURISDICTION

The Court of Appeals for the Armed Forces decided this case on September 5, 1996 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3)(1994).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

> No person shall be . . . compelled in any criminal case to be a witness against himself . . . .

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner was convicted by a general court-martial of making a false official statement and 13 specifications of making and uttering bad checks in violation of Articles 107 and 123a, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 923a (1994). He was sentenced to five years confinement, forfeiture of all pay and allowances, a $6,000.00 fine, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved this sentence, but subsequent clemency action remitted the fine, reduced the adjudged confinement to three years, and commuted the dishonorable discharge to a bad conduct discharge. The Navy-Marine Corps Court of Criminal Appeals and the Court of Appeals for the Armed Forces affirmed the findings and sentence. (App., *infra*, 1a-34a).

B. Facts

Petitioner and Lance Corporal (LCpl) David Arbuckle were charged with making and uttering bad checks. The Government originally planned to try petitioner first, grant him testimonial immunity, and then have him testify against LCpl Arbuckle. However, delays in petitioner's case caused the Government to try LCpl Arbuckle first. Petitioner was granted testimonial immunity and was interviewed by the prosecutor, Captain (Capt) J. R. Prew. Petitioner, during the interview, incriminated himself and exonerated LCpl Arbuckle. That same day, Capt Prew was replaced by a new prosecutor, Capt F. A. Delzompo.

Capt Prew subsequently reported the substance of petitioner's immunized statements to, among others, Major (Maj) J. C. Walker, the Law Center Deputy Director and Military Justice Officer, and to Lieutenant Colonel (LtCol) K. J. Naugle, the convening authority's staff judge advocate. LtCol Naugle subsequently revealed the substance of petitioner's immunized statements to the convening authority, Major General (Maj Gen) H. Blot. Capt Prew did not discuss petitioner's immunized testimony with either Capt Delzompo or Capt Poague, the new assistant prosecutor. Capt Poague, however, became aware of the substance of petitioner's immunized statements when he examined Capt Prew during the *Kastigar*[1] hearing. Capt Delzompo was not exposed to Petitioner's immunized statements because he left the courtroom during Capt Prew's testimony.

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[1] *Kastigar v. United States*, 406 U.S. 441 (1972).

A number of prosecutorial officials took action in petitioner's case after exposure to petitioner's immunized statements. The convening authority re-referred charges against petitioner to a general court-martial following the reopening of the Article 32 investigation. He also selected new court-martial members upon the advice of LtCol Naugle. LtCol Naugle and Maj Walker participated in the convening authority's decision to withdraw certain charges and proceed with others after the military judge excluded the testimony of a Government informant who was privy to petitioner's immunized statements. Capt Poague remained on the case as the assistant prosecutor after his exposure to petitioner's immunized statements.

Petitioner, at trial, made numerous motions to dismiss the charges under *Kastigar*. The military judge denied each motion to dismiss. At the conclusion of the trial, the military judge found no Government use of petitioner's immunized statements.

REASON FOR GRANTING THE PETITION

This case presents the Court with an opportunity to adopt a *per se* rule requiring the dismissal of charges where prosecutorial officials remain on a case after exposure to an accused's immunized statements.

The Fifth Amendment to the U.S. Constitution states: "No person shall be . . . compelled in any criminal case to be a witness against himself." On its face, this provision allows no exceptions. However, this Court has upheld immunity statutes on the ground that such statutes, properly drafted and administered, have the same ultimate effect as

the privilege against self-incrimination: ensuring that the witness will not later be convicted on the basis of compelled testimony. *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

The Uniform Code of Military Justice (UCMJ) has no article expressly authorizing grants of immunity. However, pursuant to his authority under Article 36, UCMJ, 10 U.S.C. § 836 (1994), to prescribe procedural rules for courts-martial, the President promulgated an immunity rule. Manual for Courts-Martial, United States (1995 ed.) (MCM), Rule for Courts-Martial (R.C.M.) 704. Under this rule, a person may be granted immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial. R.C.M. 704(a)(2). In any trial of a person granted testimonial immunity after the testimony or information is given, the Government must meet a heavy burden to show that it has not used in any way for the prosecution of that person the person's statements, testimony, or information derived from them. R.C.M. 704(a), Discussion. In many cases this burden makes difficult a later prosecution of such a person for any offense that was the subject of that person's testimony or statements. *Id.* Therefore, if it is intended to prosecute a person to whom testimonial immunity has been or will be granted for the offenses about which that person may testify or make statements, it may be necessary to try that person before the testimony or statements are given. *Id.*

In *United States v. Eastman*, 2 M.J. 417 (A.C.M.R. 1975), the Army Court of Military Review stated that reversal is required *per se* where any prosecutorial official reads an accused's immunized testimony. Such officials would include the prosecuting attorneys, the staff judge

advocate, and the convening authority. The Army Court specifically reversed Eastman's conviction because the Article 32 investigating officer and the staff judge advocate read appellant's immunized testimony.

Petitioner's conviction would be overturned under the *per se* rule of *Eastman*. Several individuals in petitioner's prosecutorial chain were aware of petitioner's immunized statements and yet continued to participate in the case. The assistant prosecutor, Capt Poague, conducted the direct examination of Capt Prew, who revealed the substance of petitioner's immunized statements. Capt Poague continued to prosecute the case, over defense objection, after this exposure. LtCol Naugle, the staff judge advocate, learned of petitioner's immunized statements from Capt Prew, yet he continued to advise the convening authority about the case. Maj Walker, the Law Center Deputy Director and Military Justice Officer, knew of petitioner's immunized statements yet he and LtCol Naugle plotted strategy after the Government informant's testimony was excluded by the military judge. Finally, the convening authority, Maj Gen Blot, referred charges and appointed members after his exposure to petitioner's immunized statements via LtCol Naugle.

The Court of Appeals for the Armed Forces declined to adopt the *Eastman per se* rule. *See* (App., *infra*, at 10a-14a). This position is consistent with that of those Circuit Courts of Appeal that have addressed the issue. *See United States v. Montoya*, 45 F.3d 1286, 1292-93 (9th Cir.)(there is no *per se* rule requiring the withdrawal of a prosecutor or other government official who may have been exposed to immunized testimony), *cert. denied*, ___ U.S. ___, 116 S.Ct. 67, 133 L.Ed. 2d 29 (1995); *United States v. Crowson*, 828 F.2d 1427 (9th Cir. 1987)(declining

to adopt *per se* rule), *cert. denied*, 488 U.S. 831 (1988); *United States v. Caporale*, 806 F.2d 1487, 1518 (11th Cir. 1986)(the focus of the *Kastigar* inquiry is not whether the prosecutor was aware of the contents of the immunized testimony, but whether he used the testimony in any way to build a case against the defendant), *cert. denied*, 483 U.S. 1021 (1987); *United States v. Pantone*, 634 F.2d 716 (3d Cir. 1980)(declining to adopt *per se* rule); *United States v. Catalano*, 491 F.2d 268, 272 (2d Cir.)(declining to hold that the prosecutor's access to grand jury testimony *ipso facto* prevents the government from carrying its burden under *Kastigar*), *cert. denied*, 419 U.S. 825 (1974).

Petitioner advocates the adoption of *Eastman's per se* rule in cases like this where prosecutorial officials continue to act after exposure to an accused's immunized statements. As a practical matter there is no other way to insure compliance with *Kastigar's* prohibition on use of immunized statements. We cannot get into the mind of Capt Poague to determine what subtle or unconscious use he made of appellant's immunized statements. The same holds true for Maj Gen Blot's decision to refer charges and detail members. We also cannot know how LtCol Naugle was subconsciously affected by his exposure to appellant's immunized statements or how his advice to Maj Gen Blot was affected. *Cf. United States v. Hinton*, 543 F.2d 1002, 1010 (2d Cir. 1976)(applying *per se* rule to mandate indictment by a second grand jury where the first grand jury heard defendant's immunized testimony because the court could not peer into the minds of the grand jurors to ensure that no use had been made of the defendant's immunized testimony); *but cf. United States v. Bartel*, 19 F.3d 1105 (6th Cir.)(rejecting the *Hinton per se* rule), *cert. denied*, ___ U.S. ___, 115 S.Ct. 113, 130 L. Ed. 2d 60 (1994); *United States v. North*, 910 F.2d 843, 870 (D.C.

Cir.), *vacated in part*, 920 F.2d 940 (D.C. Cir. 1990)(same), *cert. denied*, 500 U.S. 941 (1991); *United States v. Garrett*, 797 F.2d 656 (8th Cir. 1986)(same); *United States v. Zielezinski*, 740 F.2d 727 (9th Cir. 1984)(same).

A rule of *per se* disqualification is cost effective. It is easy to get a new prosecutor, staff judge advocate or convening authority. The accused's constitutional right against self incrimination is guaranteed. The integrity of the military justice system is preserved. Moreover, the Government cannot complain about the extra burden involved in this procedure, as it presumably evaluated the extra cost of prosecution when it decided to immunize the accused.

Without a *per se* rule an accused is "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." *Kastigar*, 406 U.S. at 469 (Marshall, J., dissenting). Indeed, the prosecutors are alone

> in a position to trace the chains of information and investigation that lead to the evidence to be used in a criminal prosecution. A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. And of course it is no answer to say he need not prove it, for though the Court puts the burden of proof on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence. The good faith of the prosecuting authorities is

thus the sole safeguard of the witness' rights.

Id.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 95-0733

Crim. App. No. 93-0228

United States, *Appellee*

v.

Kevin P. McGEENEY, Corporal
U.S. Marine Corps, *Appellant*

Argued Feb. 28, 1996

Decided Sep. 5, 1996

For Appellant: *Lieutenant Commander Howard B. Goodman*, JAGC, USN (argued)

For Appellee: *Lieutenant David M. Harrison*, JAGC, USNR (argued); *Colonel Charles Wm. Dorman*, USMC and *Commander David H. Myers*, JAGC, USN (on brief).

Opinion of the Court

GIERKE, Judge:

A general court-martial composed of officer and enlisted members at Marine Corps Air Station, El Toro, Santa Ana, California, convicted appellant, contrary to his pleas, of making a false official statement and of making and uttering bad checks (13 specifications) in violation of Articles 107 and 123a, Uniform Code of Military Justice, 10 USC §§ 907 and 923a, respectively. The approved sentence provides for a dishonorable discharge, confinement for five years, total forfeitures, a $6000.00 fine,[1] and reduction to paygrade E-1. The Naval Clemency and Parole Board mitigated the dishonorable discharge to a bad-conduct discharge, remitted the fine, and remitted confinement in excess of three years. The Court of Criminal Appeals affirmed the findings and the approved sentence. 41 M.J. 544, 552 (1994).

Our Court granted review of the following issue:

> WHETHER THE GOVERNMENT MET ITS HEAVY BURDEN UNDER *KASTIGAR V. UNITED STATES*, 406 U.S. 441 (1972), TO SHOW THAT IT MADE NO USE OF APPELLANT'S IMMUNIZED STATEMENTS.

The military judge and the court below decided that the Government met its burden. We agree.

Facts

Captain (Capt) John Prew was detailed in June 1991 to prosecute four co-accused allegedly involved in a bad-check scam: Lance Corporals (LCpi) Veronica Arbuckle,

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[1] The sentence provided for additional confinement if the fine was not paid but the convening authority did not approve that.

David Arbuckle, Brad Jepsen, and appellant. LCpl Veronica Arbuckle's court-martial began in September 1991, but the charges were withdrawn after the military judge suppressed evidence of her admissions to Naval Investigative Service (NIS) agents. Appellant's court-martial was scheduled for late November and LCpl David Arubckle's for early December. The plan was to try appellant first, grant him testimonial immunity, and force him to testify against LCpl David Arbuckle, against whom the evidence was not so strong.

At the beginning of appellant's trial, the military judge granted a defense motion to reopen the Article 32, UCMJ, 10 USC § 832, investigation on the ground that appellant had been denied his right to representation by civilian counsel. This delay in appellant's trial forced the prosecution to try Arbuckle first. The prosecution was concerned about providing a speedy trial in Arbuckle's case and did not want to postpone his trial.

When appellant's motion to reopen the Article 32 investigation was granted, the NIS investigation was completed with respect to all four suspects, except for receiving some handwriting analysis reports and writing the final investigative report. SA Schmidt had begun the investigation, but he was reassigned in July 1990, before completing it. SA Brooke Ann Adamson completed the investigation. She testified that "all the leads were done" and that there was no further investigation.

The convening authority was Major General (MajGen) Blot, Commanding General, 3d Marine Air Wing, stationed at Marine Corps Air Station, El Toro, California. He granted appellant testimonial immunity on November 26, 1991. On the weekend after Thanksgiving, Capt Prew

interviewed appellant for about an hour. Appellant told Capt Prew that LCpls David and Veronica Arbuckle "were not involved" in the check-cashing scheme but that only he and LCpl Jepsen were involved. Capt Prew took "very cryptic notes" and showed them to no one. Capt Prew told Lieutenant Colonel (LtCol) Naugel, the aircraft wing staff judge advocate, and Major (Maj) Walker, the deputy director of Joint Law Center, what appellant had said. Colonel (Col) Lucas, the staff judge advocate, Marine Corps Air Station, El Toro, was also present. Col Lucas, the senior judge advocate assigned to the air station, was the Director, Joint Law Center. He suggested that LCpl Jepsen be confronted with what appellant had said. LtCol Naugle ratified Col Lucas' advice.

Capt Prew confronted Jepsen "to see what his response was going to be." His conversation with Jepsen was by telephone and lasted "no more than 2 minutes, maybe 3 minutes." Jepsen said that "there was nothing that he would change" about his testimony and that appellant was "an outright liar." Capt Prew did nothing to verify appellant's statement because he considered himself "out of the case."

Based on appellant's statement to Capt Prew, LtCol Naugle recommended to Maj Gen Blot that the charges against LCpl David Arbuckle be withdrawn. LtCol Naugle told MajGen Blot that appellant "was going to absolve Arbuckle[,]" and he advised withdrawing the charges against Arbuckle. The meeting with MajGen Blot lasted 25-30 seconds, "maybe a minute." MajGen Blot told LtCol Naugle, "I go with your opinion," so the charges against David Arbuckle were withdrawn. LtCol Naugle's recommendation and MajGen Blot's decision were oral. Capt Prew accompanied LtCol Naugle but did not

participate in the discussion.

Maj Walker removed Capt Prew from appellant's case and appointed Capt Delzompo. Capt Prew copied all his evidence and files and gave them to Capt Delzompo on November 27. NIS Special Agent (SA) Brooke Ann Adamson, who had investigated all four cases, had her files copied and gave them to Capt Delzompo on the same date. Both LtCol Naugle and Maj Walker instructed Capt Prew not to discuss the case with Capt Delzompo. Capt Prew was not instructed to index and catalog his files or to obtain a receipt for Capt Delzompo, and he did not do so.

The Article 32 investigation of the charges against appellant was reopened on December 9, 1991, with civilian defense counsel present and participating. Capt Bowe, the original investigating officer, conducted the reopened Article 32 investigation. SA Adamson's testimony made no mention of appellant's immunized statement. The only reference to appellant's immunized statement was during former LCpl Jepsen's testimony. The summary of Jepsen's testimony reflects the following:

> Captain Prew told me that he had interviewed McGeeney . . . . I was told by Captain Prew about certain specifics that Corporal McGeeney had said. He told me him and McGeeney had spoke over the phone and face to face as to these specifics . . . .

On December 17, 1991, Capt Bowe adhered to his previous recommendation. (See 3 pages before original IO Report.) His transmittal of the reopened investigation makes no reference to appellant's immunized statement.

On December 26, LtCol Naugle transmitted the report of investigation to the convening authority, Maj Gen Blot. His supplemental pretrial advice made no mention of appellant's immunized statement. LtCol Naugle recommended that MajGen Blot "reaffirm" his earlier decision to refer the charges to a general court-martial. (Document immediately before original pretrial advice.) On December 27, MajGen Blot again referred appellant's charges to a general court-martial. LtCol Naugle testified that the decisions to withdraw the charges against LCpl David Arbuckle and to recommend rereferral of appellant's case "were unconnected."

When appellant's court-martial reconvened, defense counsel moved to dismiss the charges because of government use of immunized testimony. Capt Delzompo, trial counsel, and Capt Poague, assistant trial counsel, were present and participated during the motion hearing. When any witness testified about the substance of Capt Prew's interview of appellant, Capt Delzompo left the courtroom and Capt Poague remained.

Based on testimony and affidavits establishing the facts outlined above, the military judge found that the prosecution had established that there had been no use of appellant's immunized testimony in the decision to prosecute and refer the charges.

Jepsen testified at the motion hearing and said that his "testimony's not going to change" as a result of hearing what appellant told Capt Prew. He testified that he might add to his testimony or "clarify" it, based on what appellant said. He did not discuss the facts of the case with Capt Delzompo at any time. With Capt Delzompo absent from the courtroom, Jepsen testified that Capt Prew

told him appellant said that David Arbuckle was not involved in the offenses. He testified that he told LCpl Veronica Arbuckle about his conversation with Capt Prew. He also told SA Adamson that the charges against Arbuckle were being withdrawn because of what appellant said to Capt Prew. SA Adamson knew that Capt Prew and appellant had talked, but she testified that she did not know what they had talked about.

The military judge found that Jepsen was "aware of" appellant's "immunized statement, and with that knowledge, by his own admission, his testimony was sharpened." Appellate Exhibit LXX (located as first pages of Vol III). Consequently, the military judge excluded Jepsen's testimony.

Trial counsel informed the military judge that he did not intend to call LCpl Veronica Arbuckle as a witness. Accordingly, the military judge made no rulings about her testimony.

The military judge found that SA Adamson was aware that appellant made a statement under a grant of immunity, but she was not aware of what was said. On the merits she testified consistently with her investigative report, which predated appellant's immunized statement.

The military judge found that Staff Sergeant Franco, a member of the staff judge advocate's office, was aware that appellant had provided an immunized statement, but he was unaware of what was said. He found that SSgt Franco "merely tended to the administrative duties in preparing the case for trial."

The military judge withheld ruling on all other witnesses. Before each witness testified, he conducted a session under Article 39(a), UCMJ, 10 USC § 839(a) to determine if they were made aware of appellant's statement to Capt Prew. All witnesses on the merits testified that they did not know whether appellant made any statements or what he said. The military judge found "that none of the substantive witnesses were aware that the accused had made a statement while under the grant of immunity."

Capt Delzompo received some checks to be used as documentary evidence from Capt Prew but did not discuss the facts of the case with him. He was absent from the courtroom when Capt Prew and Private Jepsen testified about appellant's immunized statement. The military judge found that Capt Delzompo had not been exposed to any immunized testimony.

Over defense objection, the military judge permitted Capt Poague to remain as assistant trial counsel even though he had been present when Capt Prew and Pvt Jepsen testified about appellant's statements to Capt Prew. The military judge instructed Capt Poague to keep to himself what he had heard in court and not pass on any information about appellant's statements to Capt Delzompo. The military judge decided "that the curative instruction that I gave indicating that [he] not discuss that with Captain Delzompo" was a "sufficient remedy in that situation."

Based on the military judge's ruling excluding the testimony of Pvt Jepsen, the Government withdrew the charges of conspiracy (Charge I and its specification), wrongful use of lysergic acid diethylamide (LSD) (Charge III and its two specifications), and larceny (Charge IV and

its 23 specifications). The Government proceeded on one specification of making a false official statement and fifteen specifications of making and uttering bad checks.

Defense counsel renewed his motion to dismiss based on LtCol Naugle's and Maj Walker's involvement in the decision to withdraw some of the charges and specifications. On the motion to dismiss, LtCol Naugle testified that Capt Delzompo recommended withdrawing some of the charges and specifications because they could not prove them without Jepsen's testimony. When asked the extent that appellant's immunized statement to Capt Prew entered into the decision, LtCol Naugle responded, "Not at all. What was driving my concerns was the judge's rulings on what evidence was going to be available after the motion sessions." LtCol Naugle had no "discussions with higher authorities" about withdrawing the charges but left the decision to Capt Delzompo. LtCol Naugle explained his reasoning: "[A]t the point he finds himself in a position that he realizes that he no longer has sufficient evidence to proceed with a charge, he has an ethical obligation on his own not to pursue those charges, and that was his decision."

Maj Walker testified that he asked Capt Delzompo what the military judge had ruled, and Capt Delzompo told him that Jepsen's testimony had been excluded. After Maj Walker asked whether the offenses could be proved by other witnesses, Capt Delzompo told Maj Walker that he was "not comfortable talking" with him "about the case and that was the end of our conversation." Maj Walker testified that because he was aware of the issue before the court regarding appellant's immunized statement, he did not pursue the conversation any further.

The military judge denied the motion to dismiss.

After three witnesses testified on the merits, one of the court members was challenged for cause by the defense, reducing the court-martial below a quorum. A defense motion for mistrial was denied.

MajGen Blot, with advice from LtCol Naugle, selected four new members. Defense counsel challenged the new members, based on their selection by MajGen Blot and LtCol Naugle, both of whom were privy to appellant's immunized statements. The military judge denied the challenge.

Appellant was convicted of making a false official statement and of 13 of the 15 bad-check specifications.

Discussion

Appellant urges us to adopt the approach taken by the Army Court of Military Review in *United States v. Eastman*, 2 M.J. 417 (1975). There, the court held that exposure to immunized statements is *prima facie* evidence of use. Appellant argues further that, even if the *Eastman* approach is not adopted, the Government failed to carry its burden to show that immunized evidence was not used by the prosecution. The Government argues that *Eastman* goes beyond what is required and that in any event the Government met its burden of showing that the immunized evidence was not used in appellant's prosecution.

In *Kastigar v. United States*, 406 U.S. 441 (1972), the Supreme Court held that prosecutorial authorities may not use testimony compelled by a grant of immunity. We have construed "use" to include non-evidentiary use such as the

decision to prosecute. *See United States v. Olivero*, 39 MJ 246, 249 (CMA 1994), *citing United States v. Kimble*, 33 MJ 284 (CMA 1991). Other federal appellate courts have construed *Kastigar* to hold that the Government may not "alter its investigative strategy" based on immunized testimony. *See United Sates v. Harris*, 973 F.2d 333, 336 (4th Cir. 1992). Finally, the Government may not use the testimony of a witness which was influenced by the immunized testimony. *United States v. North*, 910 F.2d 843, 860 (D.C.Cir), *modified in part*, 920 F.2d 940, 942 (1990).

Under *Kastigar*, the Government has a "heavy burden" to show non-use of immunized testimony. 406 U.S. at 461. The Government must do more than negate the taint; it must affirmatively prove that its evidence "is derived from a legitimate source wholly independent of the compelled testimony." An appellant is "not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." 406 U.S. at 460. *See United States v. Boyd*, 27 M.J. 82, 85 (CMA 1988). Prosecution may proceed only "if the Government shows, by a preponderance of the evidence, that the . . . decision to prosecute was untainted by" immunized testimony. *United States v. Olivero*, 39 MJ at 249, quoting *Cunningham v. Gilevich*, 36 MJ 94, 102 (CMA 1992); *see United States v. Harris*, 973 F.2d at 336.

Whether the Government has carried its burden to show, by a preponderance of the evidence, that prosecution is based on sources independent of immunized testimony is a preliminary question of fact. *United States v. Rivera*, 1 MJ 107, 110 (CMA 1975); *see* Mil.R. Evid. 104, Manual for Courts-Martial, United States (1995 ed.). A military judge's finding that the decision to prosecute and that all

prosecution evidence is independent of the immunized testimony should not be overturned on appeal unless it is clearly erroneous or unsupported by the evidence. *See Samples v. Vest*, 38 MJ 482, 487 (CMA 1994), *citing* S. Childress & M. Davis, 1 *Federal Standards of Review* §§ 2.01 at 2-6 and 2.02 at 2-7 to 2-9 (2d ed. 1992).

Applying the foregoing principles, we hold that the court below did not err in upholding the military judge's finding that appellant's prosecution was untainted.

Starting with the NIS investigation, the evidence shows that SA Adamson completed her investigation before appellant made his immunized statement and that she made no further investigation after it. Accordingly, we hold that the court below correctly concluded that the NIS investigation was untainted by the immunized testimony.

The decision to prosecute was made before appellant's immunized statement. Prosecutorial authorities already had an oblique admission from appellant ("I wasn't the ringleader.") and thought they had a strong case against appellant. They hoped to try appellant before trying LCpl David Arbuckle and then use him to prosecute Arbuckle. We hold that the original decision to prosecute was untainted by the immunized testimony. *See United States v. Olivero*, 39 MJ at 249 ("Had the Government decided to prosecute appellant prior to his immunized testimony, it would be obvious that the prosecutorial decision was independent of his testimony.").

After the Article 32 was reopened and before MajGen Blot rereferred appellant's case, he directed that the charges against LCpl David Arbuckle be withdrawn. Although the military judge found that the MajGen Blot

may have been aware of appellant's immunized statement, the evidence shows that LtCol Naugle told MajGen Blot only that appellant exonerated David Arbuckle. There is no evidence that LtCol Naugle told MajGen Blot that appellant had incriminated himself.

When Capt Bowe reopened the Article 32 investigation, he was aware that appellant had made an immunized statement, but his report of investigation contains no evidence of the contents of appellant's statement and no reference to it. The record shows that MajGen Blot was presented with a report of investigation essentially unchanged after civilian defense counsel had an opportunity to cross-examine witnesses and that MajGen Blot adhered to his earlier decision. We hold that MajGen Blot's rereferral of appellant's case was untainted.

Turning to the prosecution team, the record amply shows that Capt Delzompo was insulated from any exposure to appellant's immunized statements. He had no conversations with his predecessor, Capt Prew, about the evidence. He did not discuss the facts with SA Adamson. He refrained from interviewing Jepsen about the facts until Jepsen actually testified.

The record indicates that Capt Poague was not exposed to appellant's immunized statements until the trial began. By this time the prosecution trial strategy was already determined. During trial on the merits, the prosecution relied on witness testimony, scientific evidence, and the fruits of a search. The record reflects no use, directly or indirectly, of appellant's admission to Capt Prew. No coconspirators testified. The military judge directed Capt Poague not to disclose what he had heard to Capt Delzompo. There is no evidence that Capt Poague did not

comply with that directive. While it might have been advisable for Capt Poague to have withdrawn from further participation after litigating the immunity issue, we decline to hold, based on this record, that his withdrawal was constitutionally required. This record supports the military judge's finding that the Government "did not in any way 'use'" appellant's immunized statements. *See United States v. Crowson*, 828 F.2d 1427, 1431 (9th Cir. 1987) (trial strategy not tainted when based on evidence from investigation that was completed before immunized testimony); *United States v. Bianco*, 534 F.2d 501, 511 n. 14 (2d Cir. 1976) (prosecutor not disqualified by reading immunized testimony where investigation already complete and prosecutor already knew everything contained in immunized testimony).

Finally, the record shows that all witnesses on the merits who testified were unaware of appellant's statement. Accordingly, we hold that their testimony was untainted.

We conclude that the record supports the finding by the military judge and the court below that the NIS investigation, prosecutorial decision, prosecution trial strategy, and the testimony of all witnesses were untainted by appellant's immunized statement.

Decision

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Chief Judge COX, Judge SULLIVAN, and Senior Judge EVERETT concur.

CRAWFORD, Judge (concurring in the result):

Kastigar v. United States, 406 U.S. 441 (1972), upheld the constitutionality of the present federal immunity statute--18 USC §§ 6002-6003. What *Kastigar* expressly recognized is where there has been immunity followed by further prosecutions, the prosecution need only establish that the evidence is derived "from legitimate independent sources." 406 U.S. at 461. In effect, *Kastigar* is an independent-source and an inevitable-discovery rule. It does not preclude the non-evidentiary use of immunized testimony. *See, e.g., United States v. Olivero*, 39 MJ 246, 251 (CMA 1994)(Crawford, J., dissenting), and cases cited therein. Because of these philosophical differences with the majority opinion, I concur only in the result.

APPENDIX B

IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

R.M. MOLLISON E.D. CLARK
WILLIAM A. DeCICCO

UNITED STATES

v.

Kevin P. MCGEENEY, 456 79 7065
Corporal (E-4), U.S. Marine Corps

PUBLISH

NMCM 93 00228 Decided 27 October 1994

Sentence adjudged 11 January 1992. Military Judge: J.F. Walsh. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Marine Aircraft Wing, FMFPac, Marine Corps Air Station, El Toro, Santa Anna, CA.

LT PHILIP SUNDEL, JAGC, USNR, Appellate Defense Counsel
LT DARRYL G. GEARY, JAGC, USNR, Appellate Defense Counsel
Maj LAURA L. SCUDDER, USMC, Appellate Government Counsel
LT SCOTT A. BROWNE, JAGC, USNR, Appellate

Government Counsel

DeCICCO, Judge:

Contrary to his pleas, a general court-martial composed of officer and enlisted members convicted the appellant of making a false official statement and of making and uttering 13 bad checks in violation of Articles 107 and 123a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 907, 923a. The court sentenced him to confinement for 5 years, forfeiture of all pay and allowances, reduction to pay grade E-1, a dishonorable discharge, and a $6,000 fine, with the additional provision that if the appellant did not pay the fine, that he serve an additional year of confinement. The action of the convening authority, taken by an officer other than the one who convened the court, approved the sentence as adjudged except for the enforcement provision for nonpayment of the fine.

On appeal to this Court under Article 66(c), UCMJ, the appellant raises six assignments of error.[1] Having

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[1] I. THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT IN HOLDING THAT THE GOVERNMENT HAD MET ITS BURDEN OF SHOWING THAT APPELLANT'S COMPELLED STATEMENTS WERE NOT USED IN ITS PROSECUTION OF APPELLANT.

II. THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT WHEN HE FAILED TO RECUSE HIMSELF AFTER REPEATEDLY COACHING THE GOVERNMENT ON HOW TO MEET ITS BURDEN UNDER KASTIGAR V. UNITED STATES.

III. THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING APPELLANT'S MOTION FOR A MISTRIAL WHEN THE COURT-MARTIAL FELL BELOW QUORUM AFTER SUBSTANTIAL

examined the record of trial and the briefs of the parties and having considered their oral arguments, we have concluded that no error prejudicial to the substantial rights of the appellant was committed. Therefore, we affirm. Our rationale follows.

Factual Background

Based on available evidence, authorities at the Marine Corps Air Station, El Toro, California, suspected that the appellant, Lance Corporal Arbuckle and Private Jepsen were involved in a scheme to pass bad checks at various stores. These authorities initially planned to prosecute the appellant first and then Lance Corporal Arbuckle. As a result, the appellant's Article 32, UCMJ, investigation was held and the convening authority subsequently referred the charges against the appellant to trial by general court-

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EVIDENCE HAD BEEN PRESENTED ON THE MERITS.

IV. THE GOVERNMENT FAILED TO PROVE APPELLANT'S GUILT OF CHARGE II AND ITS SPECIFICATIONS BEYOND A REASONABLE DOUBT WHERE NO WITNESS COULD IDENTIFY APPELLANT AS THE PERSON WHO PASSED THE CHECKS, AND THE GOVERNMENT'S HANDWRITING EXPERT COULD NOT IDENTIFY APPELLANT AS THE PERSON WHO SIGNED THE CHECKS.

V. A SENTENCE INCLUDING A DISHONORABLE DISCHARGE, CONFINEMENT FOR 5 YEARS, AND A $6,000.00 FINE IS INAPPROPRIATELY SEVERE UNDER THE CIRCUMSTANCES OF THIS CASE.

VI. THE JUDGE ADVOCATE GENERAL OF THE NAVY'S PREPARATION OF NAVY-MARINE CORPS COURT OF MILITARY REVIEW JUDGES' FITNESS REPORTS VIOLATES APPELLANT'S RIGHT TO AN IMPARTIAL JUDICIAL FORUM. (CITATION OMITTED.)

martial on 5 November 1991. However, a ruling by the military judge to reopen the Article 32 investigation because of the absence of the appellant's civilian defense counsel thwarted the prosecution's plans. Therefore, the prosecution altered its strategy and decided to try to prosecute Arbuckle first. But the Government faced substantial problems with prosecuting Arbuckle due to the lack of evidence against him. In a last-ditch effort to uncover evidence against Arbuckle, the prosecution decided to grant immunity to the appellant and question him about his knowledge of Arbuckle's role in the criminal enterprise. Major General Blot, the convening authority, signed a grant of use immunity to the appellant on 26 November 1991. Appellate Exhibit XXV.

After the general had signed the grant of immunity, the trial counsel in the appellant's case, Captain Prew, was selected to interview the appellant. But before interviewing the appellant, Captain Prew was relieved of his duties as prosecutor. He spoke with the new trial counsel, Captain Delzompo, and turned over his prosecution file to him. Captain Poague was appointed as a new assistant trial counsel.

Pursuant to the grant of immunity, the appellant, along with his detailed defense counsel, met with Captain Prew on 27 November 1991. During the interview, the appellant exonerated Arbuckle, but generally implicated both Jepsen and himself in the check writing scheme. A second conversation between Captain Prew and the appellant took place a few days later by telephone. Captain Prew reported the information given to him by the appellant to Colonel Lucas, the air station staff judge advocate, Lieutenant Colonel Naugle, the air wing staff judge advocate, and Major Walker, the military justice officer.

Following the discussion with these officers, Captain Prew then spoke with Jepsen and communicated the appellant's statements to him. Jepsen later testified during an Article 39(a), UCMJ, session at the appellant's trial that, based on what Captain Prew had told him, his trial testimony against the appellant would not "change," but he would add more to it and would clarify it.

At either the end of November or the beginning of December, the Government decided to withdraw the charges against Arbuckle. This decision was made following a meeting between the convening authority, Lieutenant Colonel Naugle and Captain Prew. At this meeting, Lieutenant Colonel Naugle advised the convening authority that Captain Prew had spoken with the appellant and the outcome of any prosecution against Arbuckle was in doubt. Captain Prew said nothing during the meeting. There was no mention of the appellant's specific admissions, and Lieutenant Colonel Naugle believed that the decision to drop the charges against Arbuckle and the decision to prosecute the appellant were totally unrelated.

The appellant's second pretrial investigation hearing was held on 8 December 1991. Subsequently, the investigating officer submitted an addendum to his report on 17 December, again recommending trial by general court-martial. Lieutenant Colonel Naugle, the convening authority's staff judge advocate, also recommended trial by general court-martial in his Article 34, UCMJ, pretrial advice letter. The letter contained no express or implied mention of the appellant's immunized statements. On 27 December, the convening authority again referred the charges to trial by general court-martial. There is no evidence in the record that anyone communicated the appellant's immunized admissions of guilt to the convening

authority at any time.

At an Article 39(a), UCMJ, session at trial, the defense made a timely motion to dismiss the charges based on the Government's alleged use of the appellant's immunized statements. The military judge held a pretrial hearing to allow the prosecution to establish that it had made no use of the appellant's immunized statements. The court heard the testimony of the Naval Investigative Service (NIS) special agent who investigated the case. She testified that at the time Captain Prew interviewed the appellant, the investigation was basically complete with the exception of the writing of the final report. She had pursued all leads and had no further investigative actions pending. Colonel Lucas testified that Captain Prew had reported the results of the interview to him and that he had not discussed them with either Captain Delzompo or Captain Poague. Lieutenant Colonel Naugle then testified that Captain Prew also told him what the appellant had said and that he did not divulge those comments to either Captain Delzompo or Captain Poague. While he admitted that he had discussed some of the logistics of the case involving witnesses with Captain Delzompo, he never told him anything of what the appellant had said to Captain Prew.

During cross-examination of Lieutenant Colonel Naugle at the hearing, the defense counsel asked him to relate the exact substance of the appellant's immunized statement to the court. Captain Delzompo, the trial counsel, then left the courtroom in order to avoid hearing the answer and facing possible disqualification from the case. Captain Poague, the assistant trial counsel, remained in court and heard the substance of the immunized statement. He also heard it during Captain Prew's testimony after Captain Delzompo again had departed the courtroom while the

substance of the appellant's statement was discussed. Jepsen also testified at this time, as summarized above.

The military judge granted the defense motion only insofar as excluding Jepsen as a witness in the case. He ruled that the Government would be required to show by a preponderance of the evidence that all of the evidence in the case was free from the taint or influence of the immunized statement. He proposed that the Government inquire of each witness prior to the witness' testimony whether he or she had heard of any statements made by the appellant and whether his or her testimony was based on an independent source.

The defense raised other specific concerns and objections related to the possible use of the appellant's statement. The first concerned the assistant trial counsel's role in continuing to participate in the prosecution of the case after having heard the substance of the immunized statement. To address this, the military judge directed that officer to "keep [that immunized statement] to yourself, do not pass it on to Captain Delzompo," and that should it later appear that the statement was being used at trial, the matter would be revisited. Record at 187. The defense then inquired:

. . . is the court condoning the fact that we now have a member of the trial team who's been privy to the immunized statements of my client, it's sufficient and okay for him to sit at counsel's table? Is that the court's finding?

MJ: It appears to be. You may call your next witness.

Id. Captain Poague remained at counsel table for the duration of the trial and conducted the examination of six

witnesses, three during a suppression motion, and the rest on the prosecution's case in chief. The defense also objected to the continued participation of Captain Delzompo in the case and the action of the convening authority referring the charges to trial on 27 December after having been briefed by his staff judge advocate who knew the substance of the immunized statements.

During the prosecution's case, every witness' testimony was preceded by an Article 39(a) session outside of the presence of the court members in which the witnesses all said they were testifying from their own recollection of events and not from anything the appellant had said. The military judge entered special findings that there was no evidence that Captain Delzompo had been exposed to the contents of the appellant's immunized statements, that the order to Captain Poague not to discuss or divulge his knowledge of the statements to Captain Delzompo resolved Captain Poague's exposure, and, at the conclusion of the trial, that the prosecution had made no use of the appellant's immunized statements. Record at 315-17; Appellate Exhibit LXX.

The Kastigar Issue

On appeal, the appellant argues that the Government made indirect and nonevidentiary use of his immunized statements. He alleges indirect use in Captain Delzompo's contacts with Captain Prew and Captain Poague's continued participation in the trial. He alleges nonevidentiary use in Lieutenant Colonel Naugle's contacts with Captain Delzompo, and the convening authority's 27 December decision to again refer the appellant's charges to court-martial. He does not argue that the prosecution made any direct use of the statements, and, based upon our

review of the record, we agree with him that there was no direct use. The military judge painstakingly avoided any direct use by the pretestimonial inquiry of all of the witnesses to ensure that their testimony was not influenced by and was independent of the appellant's immunized statements. The Government's position is that the prosecution did not make any use, indirect or nonevidentiary, of the appellant's immunized statements.

In *Kastigar v. United States*, 406 U.S. 441 (1972), the Supreme Court held that the prosecution may not use testimony that is compelled by a grant of immunity. The objective of "immunity from use and derivative use" of such compelled testimony is to "leave[] the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a . . . grant of immunity." *Id.* At 458-59, quoting *Murphy v. Waterfront Commission*, 378 U.S. 52, at 79; *United States v. Gardner*, 22 M.J. 28 (C.M.A. 1986). In the military, this protection extends not only to direct use, but also to indirect and nonevidentiary uses, and the Government may not prosecute unless it is able to prove, by a preponderance of the evidence, that it did not use the immunized testimony against the appellant, either directly or indirectly, and that the prosecutorial decision was untainted by the immunized testimony. *United States v. Olivero*, 39 M.J. 246 (C.M.A. 1994); *Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992) ; *United States v. England*, 33 M.J. 37 (C.M.A. 1991); *United States v. Kimble*, 33 M.J. 284 (C.M.A. 1991); *United States v. Boyd*, 27 M.J. 82 (C.M.A. 1988); *see also*, *United States v. North*, 910 F.2d 843 (D.C. Cir.), *modified in part*, 920 F.2d 940 (1990), *cert. denied*, 500 U.S. 941 (1991). While the Government could make its case more easily where it "catalogues" or "freezes" its evidence, such is not required

to meet the demands of *Kastigar*. *England* at 39.

The Court of Military Appeals has suggested several factors to consider in deciding whether the Government's evidence against an appellant was obtained from a source wholly independent of appellant's immunized testimony:

(1) Did the accused's immunized statement reveal anything the Government did not previously know by virtue of the accused's own pretrial statement?

(2) Was the investigation against the accused completed prior to the immunized statement?

(3) Had the decision to prosecute the accused been made prior to the immunized statement? and

(4) Did the trial counsel who had been exposed to the immunized testimony participate in the prosecution?

England at 38-39, citing *Gardner* at 31.

In this case, we have concluded that the Government's evidence was obtained wholly independent of the appellant's immunized statements to Captain Prew. First, the appellant's immunized statements did not give the prosecution any additional information that it did not already have. His statement of culpability to Captain Prew was a plain and simple admission of involvement with no further specific details. In fact, it was virtually useless as a starting point for the discovery of additional information. The only use we can discern from it at all was the decision not to prosecute Arbuckle. It had no effect on the appellant's case. At the time of the immunized statements the prosecution knew the identity of its witnesses and the

substance of their testimony. The testimony of these witnesses, who were store employees, bank officials and experts on handwriting and fingerprinting, was not of a nature that was susceptible to influence by knowledge of immunized admissions.

Second, at the time the appellant made the immunized statements, the NIS investigation was basically complete in that all leads had been exhausted and no investigatory leads were pending. *United States v. Thevis*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982). All that remained to be done was to draft the final report. Also, the NIS agent assigned to the appellant's case transferred her investigatory file to Captain Delzompo the day before the appellant gave his immunized statement, and the agent testified at trial that she had no idea what the appellant and Captain Prew had talked about. Record at 129. Captain Prew also surrendered his prosecution case file to Captain Delzompo before he spoke to the appellant. We can find no use of the appellant's statements to improve and focus the investigation or perfect the Government's case.

Next, while a "decision to prosecute" the appellant was made after he gave his immunized statements, there was also a similar decision three weeks *before* he gave them. On 5 November 1991, the convening authority referred the case to trial. The immunized statements were given on and after 27 November. Because the pretrial investigation was reopened, requiring new recommendations from the investigating officer and the staff judge advocate, another decision to refer the charges was made. But we view this second referral as a reaffirmation of the earlier decision, particularly considering the similarity of the evidence presented at the two pretrial investigations. Nothing new concerning the appellant's case was presented to the

general after the immunized statements to influence his decision to court-martial the appellant. There is nothing in the record to suggest that the decision to prosecute the appellant was made as a result of his immunized statements. *England.* We find that based on these facts, even though there was a decision to prosecute after the immunized statements were made, the Government established by a preponderance of the evidence that this decision to prosecute was not tainted by the immunized statements. *Olivero.*

Lastly, Captain Poague, the assistant trial counsel, who was exposed to the substance of the immunized statements, continued on the case and participated in the prosecution. Citing *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973), the appellant argues that Captain Poague's exposure to the statements and subsequent participation in the prosecution requires reversal because the Government did not prove that he did not make indirect uses of the information. In *McDaniel*, the prosecutor immersed himself in the defendant's immunized grand jury testimony prior to the filing of an indictment. At the time he read the transcript, he was unaware of the immunized nature of the testimony. The Court of Appeals did not hold that the prosecutor was disqualified *per se*, but merely held the Government had not sustained its burden of establishing that the prosecutor had not incorporated his knowledge of the immunized testimony by possibly "focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." 482 F.2d at 311.

The concerns that led the court in *McDaniel* to find subjective use of immunized testimony by a prosecutor are

not present in this case. Captain Poague was not exposed to the immunized information until after the trial had commenced. Therefore, he could not have used it to focus the investigation (which had been completed), to decide to initiate prosecution (which was a matter within the discretion of the convening authority), or to refuse to plea-bargain (there is nothing in the record to indicate that the appellant even attempted to strike a bargain in exchange for guilty pleas and he does not allege such at this time). Given the late stage at which Captain Poague learned of the content of the appellant's immunized statements, the fact that the Government's witnesses had already been discovered, its case prepared and its trial strategy developed, we cannot conceive of any way Captain Poague could have used the appellant's broad admission of guilty in any way. The appellant had not disclosed any information or leads that would have assisted the prosecution in its case against him by interpreting evidence or planning cross-examination and trial strategy. Captain Poague had only learned that the appellant had admitted to involvement in the scheme. But the prosecution believed the appellant was guilty before he made his immunized statements, and his subsequent general admission of guilty added nothing to the case.

We have also closely examined Captain Poague's examination of the prosecution witnesses and we have found no indication that he may have tailored his questions based on his knowledge of the immunized statements. Because the defense presented no evidence at trial on the merits, he could not have used his knowledge of the content of the immunized statements to cross-examine any defense witnesses. While Captain Poague was also ordered not to divulge the substance of the immunized statements

to Captain Delzompo,[2] the circumstances of this case, and not the order itself, are what convince us that he made no indirect use of the immunized statement. We therefore find that the Government sustained its burden in establishing that it did not use the immunized statements as a result of Captain Poague's exposure to them and his subsequent prosecutorial role. *United States v. Bianco*, 534 F.2d 501, 511 n.14 (2nd Cir. 1976) (rejecting defense assertion of error where prosecutor read the transcript of immunized testimony in preparation for defending against a defense motion to dismiss in a case where the investigation was complete and the prosecution case already prepared).

We also find no exposure of Captain Delzompo to the immunized statements. At the time of the disclosure in the courtroom, he had departed and did not hear them. All of the witnesses who testified on this issue stated that they said nothing of the substance of the appellant's immunized statements to Captain Delzompo at any time. Captain Prew turned over his prosecution file to Captain Delzompo before speaking with the appellant, as did the NIS agent with her investigatory file. The Government therefore sustained its burden with respect to Captain Delzompo's possible use of the immunized statements as well.

While there were several potential problems created by the appellant's immunized statements becoming known to

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[2] Such an order cannot be given great weight in determining whether a prosecutor actually used immunized information. An appellant is not "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." Boyd, at 85, citing *Kastigar*, 406 U.S. 460. *See also United States v. Rivera*, 1 M.J. 107 (C.M.A. 1975).

various officers, we are convinced that the Government made no use of the statements directly, indirectly or in a nonevidentiary manner. To hold otherwise in this case would be to virtually transform the appellant's use immunity into transactional immunity. However, the Government's burden under *Kastigar* is only to show by a preponderance of the evidence that the appellant was substantially in the same position as if he had exercised his Fifth Amendment rights. There is no *per se* prohibition that bars any knowledge of the statement. Even though the staff judge advocate and the assistant trial counsel knew what the appellant had told Captain Prew, the circumstances here disclose no use of the appellant's statements against him. This is all the protection the law affords the appellant and it was not violated in this case.

The Military Judge's Impartial Role

The appellant also argues that the military judge abandoned his impartial role by coaching the trial counsel on how he had to meet his burden under *Kastigar*. In fact, after several instances in which the military judge made suggestions, the defense counsel challenged the military judge for cause, arguing that his impartiality was brought into question. The challenge was denied. Record at 342.

We find no error in the actions of the military judge in this regard. A military judge may make occasional suggestions and offer guidance or recommendations to counsel on how to proceed on a matter without abandoning his or her impartiality. *United States v. Payne*, 12 C.M.A. 455, 31 C.M.R. 41 (1961). The mere fact that such assistance is given does not make the military judge a partisan advocate. *United States v. Felton*, 31 M.J. 526, 531 (A.C.M.R. 1990). This is particularly true in a

complex and unusual matter such as a *Kastigar* hearing where the military judge requires the prosecution to comply with its burden under the law. We must add, however, that there are situations when a military judge may go too far so as to lay aside the judicial cloak and improperly assume the role of part-time prosecutor. *See, United States v. Shackleford*, 2 M.J. 17 (C.M.A. 1976); *United States v. Clower*, 23 C.M.A. 15, 48 C.M.R. 307 (1974). However, such did not occur in this case.

The Mistrial Issue

After hearing the testimony of three witnesses during the prosecution's case, the military judge granted a challenge for cause against one of the court members. This reduced the court below a quorum. Following the detailing of new members to the court,[3] they were read the opening statements of counsel and the testimony of the witnesses who had testified. The defense counsel objected to this procedure, asserting that it violated the appellant's right to confront the witnesses against him and that the reading constituted an impermissible reinforcement of the testimony. He moved for a mistrial, but the military judge denied the request.

Before this Court, the appellant argues that the denial of the motion for a mistrial was error and he points out that one of the witnesses whose testimony was read to the new members had testified that the person who wrote and uttered the check in her store had a "brownish" hair color

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[3] The military judge authorized an additional peremptory challenge to each side for the new members. *United States v. Carter*, 25 M.J. 471 (C.M.A. 1988). The defense exercised its extra peremptory challenge against one of the new members. The prosecution did not.

similar to hers and was slightly taller. Obviously, the new members would not be able to use such testimony in their deliberations and compare it to the appellant's hair color if this witness' testimony was read to them and they never saw her. However, to overcome this problem, the military judge required the prosecution to recall this witness. She returned to the courtroom for what was called a "viewing" before the new members and was then excused. We conclude that this procedure resolved the problem raised by defense counsel with respect to this witness.

As for the larger question of the denial of the motion for a mistrial, the law is clear that the decision to grant a mistrial rests within the sound discretion of the military judge and his decision will not be reversed absent clear evidence of an abuse of discretion. Declaration of a mistrial is a drastic remedy and should only be granted where the circumstances demonstrate a necessity to terminate the trial to prevent a manifest injustice against the accused. *United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993); *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990); *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979); *United States v. Jeanbaptiste*, 5 M.J. 374 (C.M.A. 1978); *United States v. Clark*, 37 M.J. 1098 (N.M.C.M.R. 1993).

Article 29(b), UCMJ, 10 U.S.C. § 829(b), states:

> Whenever a general court-martial, other than a general court-martial composed of a military judge only, is reduced below five members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than five members. The trial may proceed with the new members present *after the recorded evidence previously introduced before the*

> *members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.*

(Emphasis added). Similarly, Rule for Courts-Martial 805(d)(1) prescribes the reading of prior testimony to new members, but also cautions in the *Discussion* following the rule that "[w]hen the court-martial has been reduced below a quorum, a mistrial may be appropriate."

In this case, we find that the military judge did not abuse his discretion in denying the motion for a mistrial. Only three witnesses had testified, and in order to respond to the defense's concern about their testimony being reinforced before the members, the military judge had the testimony read only to the new members, and not the full panel. Additionally, he required one of the witnesses to return to the courtroom so that the new members could view her height and hair color because she had compared these aspects of her person to those of the person who passed the check. In following the language of the UCMJ and Rule 805 strictly, we cannot find an abuse of discretion by the military judge. He handled the situation fairly and in accordance with the law. This was not a situation that called for a mistrial, and we find no merit in the appellant's argument of denial of confrontation under the Sixth Amendment.

Remaining Issues

The appellant argues in Issues IV, V, and VI that the prosecution failed to prove his guilt beyond a reasonable doubt, that his sentence is inappropriately severe, and that his right to an impartial judicial forum has been denied in light of the Judge Advocate General's preparation of

fitness reports for the judges of this Court. We are convinced of the appellant's guilt beyond a reasonable doubt, particularly considering the expert handwriting and fingerprint testimony. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). We have also concluded that the sentence is appropriate in this case. The final issue has also been decided adversely to the appellant's position. *United States v. Mitchell*, 39 M.J. 131 (C.M.A. 1994), *cert. denied*, 63 U.S.L.W. 3263 (U.S. October 3, 1994).

Accordingly, the findings and sentence, as approved on review below, are affirmed.